83-2078

No. A-843

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IN THE

Supreme Court of the United States

OCTOBER TERM 1983

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner

VERSUS

AIR PRODUCTS AND CHEMICAL, INC.
Defendant

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Whether the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C.A. Section 20(11), applies to a situation where damages arise when a railroad tank car of chemicals is mistakenly left at the receiver's place of business, and is not left as the result of an attempt to deliver it pursuant to any bill of lading?

2. Whether application of the Carmack Amendment to a suit for damages resulting from a rail car's misdelivery will create bad public policy by discouraging consignee safety, discouraging out of court settlements and encouraging forum shopping, thus causing an additional burden on the federal court system?

3. Whether a panel of a United States Circuit Court that contains a judge who recuses himself after oral argument for reasons that he knew or should have known existed prior to oral argument, satisfies the provisions of 28 U.S.C.A. Section 46(b) which requires that a hearing be before a panel of three qualified judges?

4. Whether, assuming the Carmack Amendment's applicability, it is necessary for the receiver of a misdelivered tank car, in its action against the carrier, to prove special knowledge or notice of the conditions giving rise to the special damages sued for, such damages being the cost of separation of the two similar chemicals; and if such knowledge or notice is required, does there exist any evidence in the record of this case to support an award of such special damages?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Pertinent Statutory Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 16

Proof of Service 17

Appendix A A-1

Appendix B A-9

Appendix C A-22

TABLE OF AUTHORITIES

Page

United States Code Articles:

28 U.S.C.A. §46(b) 2, 11, 12
28 U.S.C.A. §46(d) 10, 11
28 U.S.C.A. §1254(1) 2
28 U.S.C.A. §1337 4
49 U.S.C.A. §20(11) 2, 3, 5

Cases:

Adams Express Company v. Kroninger, 226 U.S. 491, 33 S.Ct. 148 (1913) 12

American Synthetic Rubber Corporation v. Louisiana and Nashville Railroad Company, 422 F.2d 462 (6th Cir. 1970) 7, 8, 10

Chicago R. I. and P. R. Co. v. Furniture Forwarders of St. Louis, Inc., 420 F.2d 385 (8th Cir. 1970) 8, 9

Globe Refining Company v. Landa Cotton Oil Co., 190 U.S. 540, 23 S.Ct. 754 (1902) 13

Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) 13

Litvak Meat Company v. Baker, 446 F.2d 329 (C.A. 10th Cir. 1971) 6

Marquette Cement Manufacturing Co. v. Louisville and Nashville R.R. Co., 281 F.Supp. 944 (E.D. Tenn. 1967), aff'd. 406 F.2d 731 (6th Cir. 1969) 13, 14, 15

TABLE OF AUTHORITIES (Continued)

Page

F. J. McCarty Company v. Southern Pacific Co., 428 F.2d 690 (9th Cir. 1970) 12

Reider v. Thompson, 339 U.S. 113, 70 S.Ct. 499 (1950) 6

St. Louis Iron Mountain and Southern Railway Co. v. Starbird, 23 U.S. 592, 37 S.Ct. 462 (1917) 8

United States v. Turkette, 101 S.Ct. 2524, 452 U.S. 576, 69 L.Ed. 2nd 246 (1981) 5

Von Der Ahe Van Lines, Inc. v. United States, 358 F.2d 999 (Court of Claim 1966), cert. denied, 87 S.Ct. 83, 385 U.S. 837 8

No. A-843

IN THE SUPREME COURT OF THE UNITED STATES

AIR PRODUCTS AND CHEMICALS, INC.
Defendant

Versus

ILLINOIS CENTRAL GULF RAILROAD COMPANY
Petitioner

PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

Petitioner prays for a writ of certiorari to review the judgment of the United States Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Louisiana, which is not reported, is reproduced in Appendix A. The opinion of the United States Fifth Circuit Court of Appeals, not yet reported, is reproduced in Appendix B. The denial of appellant's application for a rehearing before the United States Fifth Circuit Court of Appeals is reproduced in Appendix C.

JURISDICTION

The judgment of the United States Fifth Circuit Court of Appeals was entered on December 16, 1983. The application for a rehearing before the United States Fifth Circuit Court

of Appeals was timely filed on January 16, 1984. This application was denied on January 31, 1984. The jurisdiction of this court to review said denial is invoked under 28 U.S. C.A. 1254(1).

PERTINENT STATUTORY PROVISIONS

28 U.S.C.A. Section 46(b)

> "In each Circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, *not less than three*, who constitute a panel." (emphasis added).

49 U.S.C.A. Section 20 (11)

> "Any . . . railroad . . . receiving property for transportation from a point in one state

> . . . to a point in another state . . . shall issue a receipt or a bill of lading therefore, and *shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier* . . . to which such property may be delivered or over whose line or lines such property may pass . . . or . . . any railroad . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt for the full actual loss, damage or injury to such property caused by it or by any such common carrier . . . to which such property may be delivered or over whose line or lines such property may pass . . ." (emphasis added).

STATEMENT OF THE CASE

On or about November 1, 1976, defendant Illinois Central Gulf Railroad Company (hereinafter "ICG") delivered tank car SCMX 2534, along with three other similar tank cars bearing separate numbers to Air Products & Chemicals, Inc. in St. Gabriel, Louisiana (hereinafter Air Products). Tank car SMCX 2534 was consigned by bill of lading to and for Shell Chemical Company of Geismar, Louisiana and was left on the Air Products spur by mistake. The bill of lading 33660 covering tank car SCMX 2534 was properly delivered to Shell Chemical Company of Geismar, Louisiana, and not to Air Products.

The three other tank cars left on Air Products' track, containing isobutyl alcohol, were consigned to Air Products and were covered by bills of lading previously received by Air Products. Tank car SMCX 2534 contained normal butyl

alcohol, which is similar to isobutyl alcohol in both substance and appearance. No weighbill for normal butyl alcohol or for tank car SCMX 2534 had been received by Air Products. SCMX 2534 was simply "an extra" or "renegade" car, left on Air Products' spur track accidentally and not as an attempt at delivery pursuant to any bill of lading furnished to or required by Air Products.

Shortly after its arrival Air Products' employees unloaded SCMX 2534 into a million gallon storage tank containing 800,000 gallons of isobutyl alcohol. The employees did not consult their file of received bills of lading before so doing (Trial transcript pp. 40-42); nor did they test the contents of SCMX 2534 before unloading it although they possessed the means for such testing. (Trial transcript pp. 39 and 66). The only precautions the employees took was to test the contents of tank car SCMX 2534 for the presence of contaminants.

Air Products brought an action in federal court to recover damages for the cost incurred in the separation of the two chemicals mixed as a result of the foregoing. Jurisdiction was alleged on the basis of 28 U.S.C.A. 1337. The United States Court for the Middle District of Louisiana held that Air Products was entitled to a cause of action under the Carmack Amendment and was awarded damages in the amount of $73,339.12.

From the judgment of the District Court, ICG appealed to the United States Fifth Circuit Court of Appeals. The case was argued before Judge Tate, Davis, and Rubin. However, following oral argument, Judge Rubin recused himself from participation in this matter due to the existence of a business relationship between himself and Mr. Gerald LeVan, a partner in the firm of Breazeale, Sachse & Wilson, counsel for

the appellant, ICG. That business relationship, and thus the grounds for recusal, existed prior to the oral argument. Subsequently, judgment was rendered by Judges Tate and Davis, affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. *THE CARMACK AMENDMENT IS NOT APPLICABLE.*

The question now presented to this Court is res nova: Does the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C.A. Section 20 (11), afford a cause of action to a party who receives delivery of a railroad car, but does not have a bill of lading for the car, or any other documents describing its contents?

The cardinal rule of statute interpretation is that when the statutory language is clear and unambiguous, it is conclusive and must be enforced. Unambiguous statutory language may be disregarded only when there is a clear expression of legislative intent that is contrary to such language. *United States v. Turkette*, 101 S.Ct. 2524, 452 U.S. 576, 69 L.Ed. 2nd 246 (1981). The clear language of the Carmack Amendment precludes its applicability in the instant case. Neither Air Products nor the lower courts have been able to point to any expression of legislative intent to indicate that the amendment was intended to provide a cause of action to anyone other than the lawful holder of a bill of lading.

The Carmack Amendment states in pertinent part:

> "Any . . . railroad . . . receiving property for transportation from a point in one state . . . to a point in another state . . . shall issue a receipt or a bill of lading therefore, and shall be liable to the lawful holder thereof

> for any loss, damage or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or line such property may pass . . . or . . . any railroad . . . delivering said property so received and transported shall be liable to the lawful holder of said receipt for the full actual loss, damage or injury to such property caused by it or by any such common carrier . . . to which such property may be delivered or over whose line or line such property may pass . . .".

The purpose of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods. *Reider v. Thompson,* 339 U.S. 113, 70 S.Ct. 499 (1950). The Carmack Amendment was not designed as a comprehensive restatement of the law, redefining with encyclopedic breadth and detail all rights and responsibilities of interstate freight shippers and carriers. Rather, *the Act confines itself to a statement of the rights of a legal holder of a receipt or bill of lading issued by a carrier upon receiving property for interstate transportation and the responsibilities of a carrier to such holder. Litvak Meat Company v. Baker,* 446 F.2d 329 (C.A. 10th Cir. 1971). (emphasis added.) In the instant case the lawful holder of the SCMX 2534 bill of lading was Shell Chemical. Shell Chemical never received SCMX 2534 pursuant to that bill of lading. Therefore Shell Chemical made a claim for damages for the lost product under the Carmack Amendment that ICG paid. That was the proper Carmack claim, rather than that of Air Products.

Air Products did not hold a bill of lading for tank car SCMX 2534 nor was that tank car delivered pursuant to any other bill of lading held by Air Products. Therefore this action does not fall under the Carmack Amendment. The only possible cause of action Air Products has is a tort action. In a tort action Air Products own negligence would be a factor to be considered. Not having any documentation with respect to tank car SCMX 2534, Air Products was negligent in making the assumption that it also contained isobutyl alcohol just as the three other cars delivered to it at the same time, for which it did have bills of lading. Air Products did not even test the contents of tank car SCMX 2534, although it had the ability to make such a test. It made no effort to determine from representatives of defendant why the car had been left in its plant. By taking these precautions, Air Products could have easily avoided the problems it encountered when it mixed the contents of car SCMX 2534 with material contained in its storage tanks. Defendant was entitled to have this negligence of Air Products considered by the Court under applicable comparative negligence rules.

In holding that the Carmack Amendment applied to plaintiff's claims, the Fifth Circuit relied on *American Synthetic Rubber Corp. v. Louisville and Nashville Railroad Co.*, 422 F.2d 462 (C.A. 6th Cir. 1970). In that case, the plaintiff had a bill of lading for tank car GATX 84196 containing butalene. In attempting to comply with the bill of lading, the railroad delivered tank car GATX 84796, containing ethylene oxide. The Court found that the Carmack Amendment was applicable to an abortive attempt to deliver in accordance with an interstate contract of carriage - the bill of lading - and held the defendant liable under the terms of the Act.

Although it is arguable that the *American Synthetic* case should be overruled because the property delivered was not covered by the bill of lading held by the plaintiff, (see Judge O'Sullivan's dissent, 422 F.2d at 469), it is not necessary for this Honorable Court to go that far in order to hold that the lower courts misapplied the Carmack Amendment in this case. The *American Synthetic* case is easily distinguishable because the defendant there made the delivery - albeit of a wrong car - pursuant to a bill of lading; while in this case car SCMX 2534 was accidentally left with Air Products without a bill of lading of any kind. The *American Synthetic* holding is arguably within the legislative intent of making common carriers strictly liable to the holders of bills of lading. The holding in this case goes far beyond any such legislative intent. Every other case cited by the Court below or Air Products involves a plaintiff who either held a bill of lading for *the* car that was delivered, or a bill of lading under which the defendant delivered a wrong car.

Plaintiff argues that if Carmack is inapplicable, then, at the very least, an "implied contract of carriage" existed between the railroad and the plaintiff upon which recovery may be had for damages allegedly caused by the misdelivery. The same reasons that make the Carmack Amendment inapplicable to Air Products' claims must also lead to the conclusion that Air Products has no general contractual claim against ICG either. There simply was no contract between ICG and Air Products from which the misdelivery of tank car SCMX 2534 arose. The law is clear that contracts between shippers and consignees are evidenced only by valid bills of lading issued for each individual car. See *St. Louis Iron Mountain and Southern Railway Co. v. Starbird*, 23 U.S. 592, 37 S.Ct. 462 (1917); *Von Der Ahe Van Lines, Inc. v. United States*, 358 F.2d 999 (Court of Claims 1966), cert. denied, 87 S.Ct. 83, 385 U.S. 837; and *Chicago R. I.*

and P. R. Company v. Furniture Forwarders of St. Louis, Inc., 420 F.2d 385 (8th Cir. 1970). Each bill of lading evidences a separate contract of carriage. For every carriage contract which actually existed between Air Products and ICG and which was evidenced by a bill of lading, ICG delivered the appropriate tank car. The purely accidental relinquishment on Air Products' spur track of car SCMX 2534 containing a different chemical, destined for a different consignee, did not arise out of any contract or breach of a contract between Air Products and Illinois Central Gulf Railroad.

Holding the Carmack Amendment applicable to the present fact situation would carry its imposition of strict liability far beyond its intended scope and make common carriers strictly liable for ordinary negligence and without the benefit of reduction of damages by a percentage of the plaintiff's comparative negligence. In the absence of a clear and unequivocal expression of legislative intent to create such an onerous system of strict liability, this Honorable Court should refrain from imposing it on common carriers.

2. *THE APPLICATION OF THE CARMACK AMENDMENT WILL DISCOURAGE CONSIGNEE SAFETY, DISCOURAGE SETTLEMENTS, AND ENCOURAGE FORUM SHOPPING.*

If consignees of railroad tank cars are allowed to utilize the strict liability standard of the Carmack Amendment rather than a comparative negligence standard of tort liability, what will that do to the consignee's need for stricter safety standards? In light of the Fifth Circuit's ruling, plaintiff consignees need only prove that the tank car was left on their spur track. Regardless what plaintiff does subsequently with that tank car, if an accident occurs, the railroad

pays. This is bad public policy. The more reasonable approach would be to apply Louisiana's comparative tort negligence theory and examine the wrongs of both parties.

The Fifth Circuit has in this case held that a claim may lie under either federal law, the Carmack Amendment, or state tort law. If the consignee may choose which law to apply he will undoubtedly opt for federal statute and its standard of strict liability against which the railroad has no defense. Since rail car misdelivery happens fairly frequently why are there so few federal court cases on the books? The reason is due to the fact that in the past nearly all such misdelivery cases have been resolved through settlement because of the negligence of both parties. In this case, as in many others, the railroad should not have left the car at that particular location. Additionally, the consignee should not have unloaded the contents before confirming its identity. Now however, with the *American Synthetics* case and this one, there will be no more such settlements. *A consignee will only have to file his federal lawsuit and expect to be paid - no questions asked*! Again, this is bad public policy - it discourages settlement and encourages forum shopping.

3. *ICG'S APPEAL TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS WAS NOT HEARD BY A PROPER PANEL.*

ICG recognizes that, under the provisions of 28 U.S.C.A. Section 46(d), a decision by the United States Circuit Court of Appeals may be made by a quorum of the judges who sit on a panel and hear the argument in a given manner. If one of the judges should happen to die, become too ill to participate in the decision, cite, or remove himself for reasons that arise after oral argument has begun, then the remaining majority of the panel may still render a decision in that matter.

Under the provisions of 28 U.S.C.A. Section 46(b), the Circuit Court of Appeals has the power to decide the number of judges that will constitute a panel; however, that number shall not be less than three. Obviously, the judges who make up a panel must be qualified to sit on that panel. In this case, the panel did not constructively consist of three qualified judges. Judge Rubin admitted that he was not qualified to hear this matter due to his long standing business relationship with one of the partners of the firm representing the defendant, ICG.

Oral argument was made before the United States Fifth Circuit Court of Appeals on March 24, 1983. Gerald LeVan joined the firm of Breazeale, Sachse & Wilson in July of 1982. He and Judge Rubin had been receiving royalties from a joint publication since early 1982. Judge Rubin knew or should have known that this relationship, and therefore the possible conflict, existed before the oral argument began.

Judge Rubin's failure to recuse himself prior to oral argument, denied ICG the opportunity to possibly persuade a third judge who might have in turn persuaded a second judge towards appellant's position. The purpose of having a three judge panel is to allow for an intermingling of thoughts and ideas relative to the decision making process involved in every case. Obviously, the value of this thought exchange is recognized by 28 U.S.C.A. 46(b) because of the requirement that a panel consist of not less than three judges. Admittedly, should Judge Rubin have become unable to participate in the decision because of illness or grounds that arose subsequent to oral argument, prior interpretations of Section 46(d) would have allowed a quorum of the judges to make the decision. However, because Judge Rubin failed to recuse himself, for grounds which he knew or should have known to exist prior to docketing, initial conferences

and prior to the beginning of oral argument, ICG was denied the benefit of the exchange of thoughts and ideas envisioned by Section 46(b). Therefore, ICG is entitled to a rehearing before the Fifth Circuit Court of Appeals because it was constructively denied a hearing before a panel of three qualified judges as required by 28 U.S.C.A. Section 46(b).

4. *ASSUMING THAT THE CARMACK AMENDMENT IS APPLICABLE, ICG EMPLOYEES DID NOT HAVE SUFFICIENT KNOWLEDGE TO ALLOW AIR PRODUCTS TO RECOVER SPECIAL DAMAGES.*

The Fifth Circuit erred when it held that Air Products was entitled to recover special damages. The Court's holding clearly evidences the fact that it considered the damages that it awarded to Air Products to be special damages. The award is based upon the finding that the railroad employees should reasonably have anticipated (1) that Air Products did not have a procedure for checking tank cars received against bills of lading (2) that Air Products did not test chemicals before unloading them and (3) that there was more than one type of butyl alcohol or the results of mixing "iso" and "normal" butyl alcohol.

Normally, the measure of damages for a carrier's breach of contract to transport and deliver is the value of the shipment at the correct place and time of delivery, less transportation charges paid by the claimant. It is clear that a carrier's liability is not that of an insurer or a guarantor. *Adams Express Co. v. Kroninger*, 226 U.S. 491, 33 S.Ct. 148 (1913). The Carmack Amendment did not expand this common law of carrier's liability. *F. J. McCarty Co. v. Southern Pacific Co.*, 428 F.2d 690 (9th Cir. 1970). The court in *McCarty* stated:

> "Only those damages can be recovered as may be reasonably supposed to have been in the contemplation of the parties at the time they made the contract."

See also *Marquette Cement Manufacturing Co. v. The Louisville and Nashville Railroad Company*, 281 F.Supp. 944 (E.D. Tennessee 1967) affirmed 406 F.2d 731 (6th Cir. 1969), in which the court stated:

> "The Carmack Amendment did not alter the common law as to special damages. *Knowledge is a prerequisite for liability.*" (emphasis added).

See also *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854) and *Globe Refining Company v. Landa Cotton Oil Co.*, 190 U.S. 540, 23 S.Ct. 754 (1902).

The costs incurred by Air Products in separating the misdelivered normal butyl alcohol from the isobutyl alcohol were clearly special damages falling within the special knowledge rule. In *Marquette*, supra, the carrier misdelivered "air-entrained" cement suitable only for making concrete pipe, to the ready-mix division of a materials company. The ready-mix concrete made from this shipment was defective and suit was brought against the railroad to recover damages that resulted from the misdelivered cement. The Court awarded the plaintiff the value of the shipment and the freight charges but refused to award any special damages. With regard to special or consequential damages not awarded, the Court stated:

> "With respect to the remaining items of damage claimed by the plaintiff, that is the

> cost of testing and removing the defective concrete from the construction sites, such damages may be considered only as special or consequential damages. With respect to their recovery the issue then arises as to whether the special circumstances giving rise to the damages were communicated to or were known by the defendant at the time the contract of carriage was made. In order to recover special damages under the circumstances of this case, it must appear that at the time of the making of the contract of carriage that the defendant had notice or knowledge of the special conditions rendering such damages the natural and probable result of the breach [citations omitted]." (At page 950).

The costs incurred by the plaintiff in *Marquette* in removing or separating defective cement from the construction sites are closely analogous to the costs incurred by Air Products in the instant case in separating the normal butyl alcohol from the isobutyl alcohol. Again, and clearly, such damages are "special damages".

It is also evident that Air Products has not shown that ICG or any of its employees, at the time of the making of the contract of carriage with Shell Chemical or at the time of entering the contract of carriage with Air Products for the isobutyl alcohol, had any "notice or knowledge of the special conditions" rendering such damages, "the cost of alcohol separation" or the natural and probable result of a breach of contract (the misdelivery). Each of the tank cars of both "iso" and "normal" butyl alcohol were marked with the same placard - "Dangerous Butyl Alcohol". The record

is totally void of any evidence showing that any ICG employee had any knowledge that there even existed more than one type of butyl alcohol, much less knowledge of the damages which might result from the mixing of the two chemicals.

The mere fact that the bill of lading for tank car SCMX 2534 sent to Shell Chemical Company at Geismar was correctly marked stating that it contained normal butyl alcohol does not establish sufficient knowledge for ICG to have known the possible consequential results of misdelivery. The *Marquette* decision specifically found such information on the bill of lading to be insufficient to establish special knowledge on the part of the railroad. The Court stated in *Marquette*:

> "The court is of the opinion that the evidence does not establish such notice or knowledge upon the part of the defendant. It is true that the bill of lading did designate the shipment as 'air-entrained cement'. This information is not sufficient, however, to put the carrier on notice as to the use for which it would be put. Nor is it sufficient to put the carrier on notice that an additional 'air-entraining agent would be added to the cement by the plaintiff, thereby rendering it unsuited for structural use. The notice here received by the carrier by the inclusion of the words 'air-entrained cement' upon the bill of lading was not sufficient to render reasonably foreseeable the subsequent events which resulted in the expenses incurred by the plaintiff in testing and removing the defective concrete." *Marquette* at 950-951.

The special damages claimed by Air Products are simply not supported by any evidence and are not a proper part of any award in this case.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit is contrary to the clear and unambiguous language of the Carmack Amendment to the Interstate Commerce Act. Further it will frustrate settlement possibilities in cases of rail car misdeliveries between carriers and consignees and will encourage forum shopping. The decision is of national importance and merits this Court's attention. The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED:

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PROOF OF SERVICE

I, Boris F. Navratil, attorney for Illinois Central Gulf Railroad Company, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 30th day of May, 1984, I served the foregoing petition for a writ of certiorari, and its appendices, on Air Products and Chemical, Inc., respondent in connection with this application for a writ of certiorari, by mailing three copies thereof to its counsel of record, Wallace A. Hunter, Esquire, Suite 614, Louisiana National Bank Building, 451 Florida Street, Baton Rouge, Louisiana 70801.

Boris F. Navratil per B.P.S.

Boris F. Navratil

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 80-522-A

Received May 13, 1982

AIR PRODUCTS AND
CHEMICALS, INC.

VERSUS

ILLINOIS CENTRAL GULF
RAILROAD COMPANY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. *Findings of Fact*

1. Plaintiff, Air Products, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the Commonwealth of Pennsylvania. Illinois Central Gulf Railroad is a corporation, authorized to do and doing business in the State of Louisiana, with its principal place of business in the State of Illinois.

2. Plaintiff is the owner of a chemical plant facility located near St. Gabriel, Louisiana. In connection with its operations at this facility in November, 1976, plaintiff used a liquid raw material known as "isobutanol" routinely purchased under a contract between plaintiff and Shell Chemical Company, Houston, Texas. The raw material ordered was shipped by rail from Shell's facility in Houston

to plaintiff's facility in St. Gabriel as requisitioned by plaintiff.

3. The parties have stipulated to the following facts:

a. On or about November 1, 1976, car no. SCMX 2534, along with several other cars was delivered to Air Products and Chemicals, Inc. on its inbound switch-track at St. Gabriel, Louisiana, by Illinois Central Gulf Railroad.

b. The product contained in Car No. SCMX 2534 was normal butanol.

c. Tank car SCMX 2534 was not consigned to Air Products and Chemicals, Inc. but to Shell Chemical at Geismar, Louisiana.

d. Tank car no. SCMX 2534 together with three other cars delivered to Air Products on November 1, 1976, were shipped from Shell Chemical, Houston, Texas.

e. All four cars which were delivered to Air Products on November 1, 1976, including car no. SCMX 2534, were identified by placards reading "contains butyl alcohol."

f. There are four types of butyl alcohol, one of which is "normal butanol" and another which is "isobutanol."

g. Air Products and Chemicals, Inc. had placed an order with Shell Chemical, Houston, Texas for shipments of "isobutanol" which it used at its St. Gabriel, Louisiana facility.

h. Tank car no. SCMX 2534 was unloaded by representatives of Air Products and Chemicals, Inc. into an above ground storage tank which at the time contained 811,873 gallons of "isobutanol."

i. Following the unloading of tank car no. SCMX 2534 it was discovered by representatives of Air Products that the car SCMX 2534 had not been consigned to Air Products but was on consignment to Shell Chemical at Geismar, Louisiana, and that the product contained therein was normal butanol.

j. Both normal butanol and isobutanol are clear and colorless liquids of the same viscosity.

4. The established procedure was that a copy of the bill of lading would be mailed to Air Products near the time the shipment was placed with the railroad.

5. Air Products would receive these bills of lading at various times, sometimes before and sometimes after the shipment had arrived.

6. Plaintiff was holder of the three bills of lading for the three tank cars of isobutanol ordered from Shell in Houston.

7. When these tank cars arrived in Geismar, Louisiana, it was normal procedure for ICG to call Air Products and inform them of the number of cars arriving that day.

8. Air Products then made up a switch list from the information supplied by ICG and by the plant as to how many cars were already at the plant and where they were located.

9. The switch list told the railroad how many tanks to deliver and where to place them, either on track A or B.

10. When cars are delivered, Air Products runs an analysis on the contents of the tank cars to obtain the quality of the chemical, but does not run tests to ascertain the type of chemical contained therein.

11. Air Products unloads all deliveries of isobutanol into a large storage tank at the plant and the railroad employees were aware of that established procedure.

12. It was not feasible to wait until the bills of lading were received before unloading, because Air Products handled about 19 tank cars of isobutanol a month during the relevant period of time.

13. Since the plant uses this chemical every day, plaintiff cannot allow tank cars to sit idly by and stack up; they must be unloaded for processing and to make room for additional cars.

14. The load of normal butanol contaminated contents of the storage tank which contained at that time about 800,000 gallons of product.

15. Air Products used its own plant facilities to decontaminate a substantial portion of the product. Use of the plant facilities minimized damages.

16. After the initial processing at the Air Products Plant, an additional quantity of raw material remained contaminated and plaintiff, after shipping a test truck load of the material, shipped the remainder of the contaminated product to Dow Badische Company at Freeport, Texas for further

processing. That company was able to decontaminate the remaining amount of product.

17. During the processing at the Air Products Plant and at Dow Badische Company, a certain amount of product was lost due to the distillation process employed.

18. Plaintiff claims that it sustained damages in the amount of $95,184.48 as a result of the misdelivery of the tank car containing normal butanol. Although plaintiff's evidence was somewhat inconsistent and uncertain, plaintiff has established the following damages caused by the misdelivery of the tank car by a preponderance of the evidence:

a. Cost of "reprocessing" contaminated material at Air Products Plant:

1. Labor and materials	$11,199.30
Fuel Oil Cost	41,101.86
Electrical Cost	1,880.26
Raw material loss	11,039.61
SUBTOTAL	65,221.03

b. Cost of reprocessing contaminated material at Dow Badische Company and transportation to and from that plant:

1. "Reprocessing" cost	$15,656.60
Delivery charges and cost of initial truck load	9,720.73
Raw material loss	4,277.89
SUBTOTAL	$29,655.22

TOTAL.....$94,876.25

19. Air Products shipped the entire contents of the misdelivered tank car to Dow Badische and made no attempt to recover it. The value of the contents of the tank car was $21,537.13.

20. The defendant railroad paid the sum of $21,537.13 to Shell Chemical Company, the concern which had actually ordered the contents of the misdelivered tank car.

II. *Conclusions of Law*

1. The court has jurisdiction under 28 U.S.C. §1337 and under 28 U.S.C. §1332.

2. The Carmack Amendment, 49 U.S.C. §20(11) is applicable to this litigation and plaintiff has standing to assert a cause of action for breach of a contract of carriage in interstate commerce. *American Synthetic Rubber Corp. v. Louisville & N.R. Co.*, 422 F.2d 462 (6th Cir. 1970); *Marquette Cement Mfg. Co. v. Louisville & Nashville Railroad Co.*, 281 F.Supp. 944 (E.D. Tenn. 1967), *affirmed* 406 F.2d 731 (6th Cir. 1969); *Stroh Brewery Co. v. Grand Truck Western Railroad Co.*, 513 F.Supp. 827 (E.D. Mich. 1981).

3. An interstate carrier is liable not only for the delay in delivery but also for misdelivery and for the foreseeable damages thereby incurred by the consignee; that is to say, despite the fact that plaintiff did not hold a bill of lading for the misdelivered tank car, it may nevertheless assert a cause of action for breach of its contract of carriage and for foreseeable damages thereby incurred. *American Synthetic Rubber Copr. v. L. & N. Railroad Co.*, supra; see also, *Adams Express Co. v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913); *New York, Philadelphia & Norfolk Railroad Co. v. Peninsula Produce Exchange*, 240 U.S. 34, 36 S.Ct. 230, 60 L.Ed. 511 (1916).

4. Defendant seeks to limit its liability to "non-consequential damages" suffered by plaintiff, specifically the cost of delivering a proper tank car containing isobutanol as called for in the contract of carriage. Defendant cites *Marquette Cement Mfg. Co. v. Louisville & Nashville Railroad Co.*, 281 F.Supp. 944 (E.D. Tenn. 1967), *affirmed* 406 F.2d 731 (6th Cir. 1969), for that proposition. Whatever may have been the situation in that case, the court finds that it was foreseeable to the employees of the railroad in this case that damages such as those sustained by Air Products could be caused by a misdelivery of product.

5. The railroad employees were on notice that shipments of isobutanol were unloaded into a storage tank of 1,000,000 gallon capacity. Obviously all such chemicals were mixed when unloaded into the tank. It is not necessary that the employees know the exact properties of the chemicals involved for them to reasonably anticipate that a mixture of chemicals in the tank would result in contamination of the entire contents. It is also foreseeable that it would cost money to decontaminate the contents of the storage tank. The court finds that these damages sustained by Air Products were foreseeable as a result of the misdelivery of a tank car containing chemicals other than those requested.

6. There was no contributory negligence upon Air Products relating to failure to run extensive chemical analyses of the products prior to unloading. All the railroad had to do was to make the correct delivery and there was no necessity for any chemical analysis. The railroad's contract of carriage calls for it to make correct deliveries.

7. The value of the chemical contained in the misdelivered tank car must be deducted from the award in favor of Air Products since it retained that chemical and apparently

gave it away to Dow Badische Company.

8. There will judgment herein in favor of plaintiff and against defendant in the sum of $94,876.25, subject to a credit in the amount of $21,537.13, or $73,339.12 together with interest and costs.

Baton Rouge, Louisiana, May 12, 1982.

/s/ John V. Parker
JOHN V. PARKER,
CHIEF JUDGE
MIDDLE DISTRICT OF
LOUISIANA

APPENDIX B

CORRECTED

AIR PRODUCTS & CHEMICALS v. ILL. CENT. GULF R.R.

AIR PRODUCTS AND CHEMICALS, INC., Plaintiff-Appellee,

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY, Defendant-Appellant.

No. 82-3356

United States Court of Appeals, Fifth Circuit.

Dec. 16, 1983.

Consignee brought action against carrier to recover damages resulting misdelivery of chemicals. The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, entered judgment in favor of consignee, and carrier appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) carrier was liable to consignee for misdelivery of chemicals, and (2) consignee was entitled to recover processing costs for decontamination of large storage tank contaminated by wrong chemical delivered by carrier.

Affirmed.

1. Carriers key 69(1)

Statute providing that a railroad is required to issue a bill of lading upon receiving property for transportation in interstate commerce, and that railroad is liable to lawful holder of bill of lading for damages with regard to property transported, provides exclusive remedy for a breach of a contract of carriage provided by a bill of lading, including foreseeable damages resulting from delivery of different cargo than that specified by bill of lading issued to damaged consignee. Interstate Commerce Act, §20(11), 49 U.S.C. (1976 Ed.) §20(11).

2. Carriers key 93

Carrier's delivery of different chemicals than those for which bills of lading were issued and which carrier had contracted to deliver to consignee rendered carrier liable under statute providing that a railroad is required to issue a bill of lading upon receiving property for transportation in interstate commerce, and that railroad would be liable to lawful holder of bill of lading for damages with regard to property transported, even though no bill of lading was issued to consignee with regard to misdelivered chemicals, since misdelivery plainly resulted from a breach in carrier's duty to deliver to consignee the right product as intended by series of bills of ladings issued by railroad to transport the given chemical to consignee's premises in accordance with their terms. Interstate Commerce Act, §20(11), 49 U.S.C. (1976 Ed.) §20(11).

3. Carriers key 94(4)

Fact that a mixture of chemicals would result in contamination of entire contents of consignee's large storage tank, and that it would cost money to remove the contami-

nation, should reasonably have been anticipated by carrier's employees, entitling consignee to recover reprocessing costs of decontaminating storage tank caused by carrier's misdelivery to consignee's premises of chemical which was intended for another consignee and which caused contamination.

Appeal from the United States District Court for the Middle District of Louisiana.

Before TATE, Circuit Judge, and DAVIS,* District Judge.**

TATE, Circuit Judge:

The defendant carrier ("Illinois Central") appeals. The district court judgment awarded the plaintiff consignee ("Air Products") damages caused by a misdelivery to its premises of contaminating cargo intended for another consignee. Air Products' complaint is based upon the Carmack Amendment. 49 U.S.C. §20(11) (1906). The district court awarded Air Products the damages resulting from the breach through such misdelivery of Illinois Central's contract to deliver the intended cargo to Air Products, as specified by the bill(s) of lading issued by Illinois Central to Air Products. Illinois Central appeals, principally con-

Judge Davis participated by designation in the oral argument of this case as a United States District Judge for the Western District of Louisiana. Since that time he has been appointed as a Fifth Circuit Judge.

**** This opinion is being entered by a quorum of this panel pursuant to 28 U.S.C. §46(d). Judge Rubin was a member of the panel that heard oral argument, but subsequently disqualified himself from further participation in this case.**

tending that the present consignee does not have a cause of action against a carrier for breach of a contractual obligation under the Carmack Amendment, because, as to the misdelivered damage-causing cargo, the consignee Air Products had not been issued a bill of lading and, therefore, as to this cargo, no contract was made between the parties.

[1] We affirm. We agree with the district court that the Carmack Amendment, as judicially interpreted, provides an exclusive remedy for a breach of a contract of carriage provided by a bill of lading, and that this remedy includes foreseeable damages resulting from misdelivery of different cargo than that specified by the bill of lading issued to the damaged consignee. This conclusion, moreover, is in accord with the only other reported decision on the issue cited to us. *American Synthetic Rubber Corporation v. Louisville & Nashville Railroad Company*, 422 F.2d 462 (6th Cir. 1970).

This litigation arises out of the following facts:

The plaintiff-consignee, Air Products, had ordered 400,000 gallons of a chemical from the shipper ("Shell") to be delivered over a period of days, during which a series of bills of lading were issued by the defendant railroad, Illinois Central, one for each tank car delivered without incident.

On November 1, Illinois Central delivered four tank cars to Air Products, but one of them (for which a bill of lading had been issued to a different consignee at another location) was delivered at Air Products' premises through the railroad's misrouting error. This fourth tank car contained a chemical similar to and indistinguishable in appearance to the chemical ordered by Air Products that was intended to be delivered. Without fault on the part of Air Products, which had then tested the liquids for impurities, all four

tank cars thus received were, in accordance with the normal practice, emptied into a large storage tank of the chemical on its premises - but an ingredient in the misdelivered chemical contaminated the entire contents of the large storage tank. The reprocessing costs caused net damages of $73,393.12. The district court awarded this amount to Air Products.

I.

In its complaint, Air Products had alleged that the "misdelivery" of the tank car entitled it to recover under the Carmack Amendment.[1] Pertinently to the present cause of action, this statutory enactment provides that a railroad is required to issue a bill of lading upon receiving property for transportation in interstate commerce, and that this railroad "delivering said property so received and transported shall be liable to the lawful holder of [the] bill of lading" for damages with regard to the property transported. 49 U.S.C. §20(11) (1906).[2]

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1. This action was originally filed in the Northern District of Illinois seeking damages primarily under a tort theory and alternatively under the Carmack Amendment for breach of contract. After two venue transfers, the action was retained by the Middle District of Louisiana. The plaintiff's tort action was met with a motion to dismiss based on the Louisiana one year prescriptive period. The district court ruled that Illinois Central's misdelivery of the car breached the railroad's obligation under its contract of carriage and granted a recovery to Air Products. The district court, therefore, found it unnecessary to determine whether plaintiff's tort action had prescribed under Louisiana law.

2. The Carmack Amendment pertinently provides:

> Any * * * railroad * * * receiving property for transportation from a point in one state * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to

Despite the apparent statutory limitation to recovery of damage caused to the property itself transported, the Supreme Court (as the present carrier does not dispute) from its earliest interpretation has consistently construed the Amendment as likewise imposing liability upon the carrier for all reasonably foreseeable consequential damages resulting from a breach of the contract of carriage, including those resulting from nondelivery of the shipped goods as provided by the bill of lading. *See, e.g., Southeastern Express Company v. Pastime Amusement Company*, 299 U.S. 28, 57 S.Ct. 73, 81 L.Ed. 20 (1936); *New York, Philadelphia & Norfolk Railroad Company v. Peninsula Produce Exchange of Maryland*, 240 U.S. 34, 36 S.Ct. 230, 60 L.Ed. 511 (1906); *Adams Express Company v. Croninger*, 226 U.S. 491, 33 S.Ct. 148, 57 L.Ed. 314 (1913). "The words 'any loss, damage, or injury to such property' . . . are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination." *Peninsula Produce Exchange, supra*, 240 U.S. at 38, 36 S.Ct. at 232. *See also Georgia, Florida & Alabama Railway Company v. Blish Milling Co.*, 241 U.S. 190, 196, 36 S.Ct. 541, 544, 60 L.Ed. 948 (1916).

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2. Continued

> such property caused by it or by any common carrier * * * to which such property may be delivered or over whose line or lines such property may pass * * * or any * * * railroad * * * delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading * * * for the full actual loss, damage, or injury to such property caused by it or by any such common carrier * * * to which such property may be delivered or over whose line or lines such property may pass * * *. 49 U.S.C. §20(11) (1906).

This broad interpretation of a carrier's liability under its bills of lading was premised upon what the Court conceived to be a paramount object of the legislation - to provide a uniform rule that the carrier issuing the bill of lading would be responsible to the consignee for all loss, damage, or delay arising out of the contract to transport the goods so shipped. *Peninsula Produce Exchange, supra,* 240 U.S. at 37, 36 S.Ct. at 231; *Adams Express Company, supra,* 226 U.S. at 503-10, 33 S.Ct. at 151-53; *Atlantic Coast Line Railroad Company v. Riverside Mills,* 219 U.S. 186, 199-203, 31 S.Ct. 164, 167-70, 55 L.Ed. 167 (1911). Moreover, a purpose was to substitute a paramount and uniform national law as to the rights and liabilities of interstate carriers subject to the Amendment. As stated in *Adams Express Company,* 226 U.S. at 505-06, 33 S.Ct. at 152:

> That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract.
>
> * * * * * *
>
> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the

> amendment. The duty to issue a bill of lading, and the liability thereby assumed, are covered in full; and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.
>
> What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage, or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. . . . The liability thus imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered;" and plainly implies a liability for some default in its common-law duty as a common carrier.

II.

Illinois Central, the defendant carrier, points out that no bill of lading was issued to Air Products with regard to the misdelivered tank car, and that thus the only contract with regard thereto is represented by the bill of lading issued to the different (intended) consignee. Illinois Central forcefully argues that the Carmack Amendment does not provide a cause of action with regard to the misdelivered cargo, since with regard thereto Air Products, the plaintiff consignee, was not "the lawful holder of [a] bill of lading" who, under the statutory language, is entitled to recover the "full actual loss . . . caused by" the carrier. 49 U.S.C. § 20(11) (quoted in note 2 *supra*).

[2] What Illinois Central's argument overlooks, however, is that no claim is made that the Carmack Amendment relationship of carrier and consignee between Illinois Central and Air Products arose out of the bill of lading for the misdelivered tank car (that had been issued to a third party). Instead, the relationship of carrier and shipper here arose out of the issuance of a series of bills of ladings by Illinois Central to transport the given chemical to Air Products' premises in accordance with their terms.

The breach of the contract here urged is Illinois Central's delivery to Air Products, causing damage, of a tank car concerning an injurious substance, instead of one of the tank cars containing the proper chemicals for which the bills of lading were issued and which Illinois Central contracted to deliver to Air Products. The misdelivery was as much a breach of the contract to deliver the right product in a tank car for which a bill of lading had been issued, as a failure to deliver or a delay in delivery of a tank car according to the terms of the bill of lading. The carrier thus breached a contractual duty to deliver a tank car containing *the product specified* to Air Products' premises.

Indeed, although it is well settled that the same act may result in tortious as well as contractual-breach liability at the election of the injured person, here the primary reason for the misdelivery arose from the bills of lading issued by Illinois Central to carry the intended chemicals to Air Products' premises, and Illinois Central's breach, in attempted performance of those contracts, through its mistaken delivery of the wrong tank car.[3]

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3. For present purposes, it is unnecessary to characterize the contract breached as the entire series of bills of ladings or, instead, as only the bill of lading issued for the tank car that next arrived and for which, instead, the misdelivered car was furnished.

As the authorities previously noted hold, Congress intended by the Carmack Amendment to provide a uniform national remedy against carriers for breach of the contract of carriage, including a liability for default in any common-law duty as a common carrier. The misdelivery here in question, in our opinion, plainly resulted from a breach in the carrier's duty to deliver to Air Products the right product as intended by the bill(s) of lading issued by it.

No authority cited or that we have found indicates that Congress intended by the Carmack Amendment that an injured consignee be deprived of a remedy for breach of contract available to him under general contractual theory. This statutory attempt to supercede overlapping and sometimes differing state remedies for breach is nowhere shown to have been intended to modify the common-law duties of a common carrier under its contract of carriage, nor to eliminate recovery for their breach simply because the carrier issued a bill of lading. To the contrary, as the decisions show, the statutory emphasis upon a carrier's liability under the bill of lading issued by it was, in the interests of shippers and consignees, to centralize in one carrier - the one that issued the bill of lading - liability for breaches in the contract of carriage, so that shippers and consignees could look to this one source (instead of seeking out fault from among connecting carriers) for damages caused by *any* default in the performance of the contract of carriage.

In 1970, the Sixth Circuit rejected contentions similar to those now advanced by Illinois Central and arising from a generically identical situation. *American Synthetic Rubber Corporation, supra.* No opposing decision is cited to us. As there stated,

> Under this interpretation [of the Amendment], the carrier is liable not only for delay

> in delivery but also for a misdelivery and the foreseeable damages thereby incurred by the consignee. Stated differently, the carrier is responsible under the Act for what is delivered as well as when it is delivered. The significant factor is that a carrier is answerable in damages for its breach of the contract of carriage. In the instant case, appellants' cause of action is essentially one for breach of contract of carriage in that, due to a mix-up of waybills, the carrier delivered the wrong tank car. Appellants' damages were incurred by the abortive attempt of the carrier to perform its contract. Except for the contract of carriage, no car would have been delivered. Except for the contract of carriage and their reliance on it, appellants' employees would not have accepted a tank car of unknown chemicals and fed them into appellants' plant facilities.

422 F.2d at 466.

We see no reason to reach a contrary conclusion and, therefore, we affirm the district court's decision on this issue, which was guided by this precedent.[4]

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4. Despite carrier dissatisfaction with the interpretation reached by *American Synthetic* Congress has not seen fit to narrow a carrier's liability under its bill of lading as there interpreted more than thirteen years ago. Even if we were not persuaded that the *American Synthetics* construction is more consistent with the statutory purpose and Supreme Court jurisprudence than that advanced by Illinois Central, we would be disinclined to adopt for this circuit an interpretation that differs from this previously established rule.

III.

[3] Alternatively, Illinois Central argues that, even if the Carmack Amendment does recognize a cause of action for damages resulting from the present misdelivery, Air Products has not borne its burden of proving that the particular damages sought are recoverable. It relies upon the rule that recoverable damages only include those reasonably within the contemplation of the parties at the time they made the contract, so that therefore "special damages" not readily foreseeable as the ordinary and natural consequences of the contractual breach are not recoverable unless the carrier had notice or knowledge of the special circumstances from which such damage would flow. *See, e. g., Marquette Cement Manufacturing Company v. Louisville and Nashville Railroad Company*, 281 F.Supp. 944, 941-49 (E.D.Tenn., 1967), *aff'd* 406 F.2d 731 (6th Cir. 1969).

In rejecting this argument, the district court found that, under the present facts, it was foreseeable to employees of Illinois Central that damages such as those sustained would result from a misdelivery of product. The facts included the knowledge of the railroad employees that Air Products immediately unloaded all deliveries of chemicals into its 800,000-gallon storage tank, since it was not feasible to do more than impurity-testing or to have tank cars (17 a month) pile up while awaiting bills of lading or more extensive chemical testing. The district court concluded that, even without knowing the exact properties of the chemicals delivered, the railroad employees should reasonably have anticipated, under the facts known to them, that a mixture of chemicals would result in contamination of the entire contents of the large storage tank, and that it would cost money to remove the decontamination.

We are unable to hold that these primarily factual determinations by the district court are clearly erroneous, Fed.R.Civ.P. 52(a), and therefore affirm them.

Conclusion

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3356

AIR PRODUCTS AND CHEMICAL, INC.,
Plaintiff-Appellee,

versus

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Defendant-Appellant.

FILED JANUARY 31, 1984

Appeal from the United States District Court for the
Middle District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion December 16, 1983, 5 Cir., 198_, _____F.2d _____)

(January 31, 1984)

Before TATE, Circuit Judge, and DAVIS*, District Judge.**

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Tate
United States Circuit Judge

*Judge Davis participated by designation in the oral argument of this case as a United States District Judge for the Western District of Louisiana. Since that time he has been appointed as a Fifth Circuit Judge.